## PUBLIC PROSECUTOR v. MAT ZAIN

[O. Cr. J. (Callow J.) May 5, 1949]

[Alor Star — Criminal Trial No. 6 of 1949]

*Criminal Procedure Code (Cap. 6), ss. 147, 158 and 254 — Withdrawal of charge — Whether discharge should amount to acquittal or not — Bail — Proof of exhibits — Alibi defence.*

In this case the accused was charged with robbery. It appeared he had been previously charged with the offence, but the charge had been withdrawn and he had been discharged not amounting to an acquittal.

In the course of his judgment Callow J. dealt with various unsatisfactory features of the trial and *inter alia* ruled: (1) when a charge is withdrawn and the accused discharged, the discharge should amount to an acquittal unless good cause is otherwise shown. An accused person is entitled to trial and determination; only in exceptional circumstances should the charge be permitted to remain indefinitely held against him; (2) in non-bailable cases, bail is at the discretion of the Court and in exercising its discretion the Court must consider the gravity of the crime; (3) a committing Magistrate should enquire from the accused person on committal as to whether he requires a copy of the depositions so that he may have early opportunity to prepare his defence; (4) it is essential that there should be a proper proof of exhibits from the time of acquirement. The chain must be complete from first possession to the Court; (5) even in cases where the defence of alibi has not been disclosed, the Police should make inquiries as to the whereabouts of the accused at about the time of the alleged offence.

*Case referred to:—*

(1) *R. v. Liddle* 21 Cr. App. R. 3.

CRIMINAL TRIAL.

*C. V. Boyle* (D. P. P.) for the Public Prosecutor.

*Lee Thean Chu* for the accused.

**Callow J.** : — This has been an unsatisfactory case. The offence is dated the 15th of October, 1948, and the accused was arrested the next day. Court form 192 attached to the Preliminary Inquiry in accordance with section 147 of the Criminal Procedure Code then states he was discharged. Mr. Boyle, Deputy Public Prosecutor, informed me that the accused had actually been arraigned before a Magistrate and discharged, the discharge not amounting to an acquittal.

I do not know the reason for this or the nature of the charge preferred but a discharge amounting to an acquittal should be in exceptional circumstances. I presume the withdrawal was made by the prosecuting officer in accordance with section 254 of the Criminal Procedure Code. This procedure may be caused by it becoming clear that the charge is not sustainable (*Sohoni*, 14th Edn. page 651), or for reasons of expediency. The Court should record the reason, and the discharge should amount to an acquittal unless good cause is otherwise shown; an accused person is entitled to trial and determination; only in exceptional circumstances should the charge be permitted to remain indefinitely held against him.

In connection with this appearance before a Magistrate I was told that the Police opposed bail but it was granted because the accused's advocate persisted on the grounds that the accused was a person of substance. Furthermore Mr. Boyle intimated this was not uncommon. If so, the appreciation of all the principles upon which bail may be granted cannot be fully realised. The principles are set out in *Mallal* 3rd Edn. at pages 445 and 446 and in *Sohoni* 14th Edn. Chapter XXXIX beginning at page 963 (and see (1947) M.L.J. xxx). It is true that the chief ground for bail is to secure appearance at trial, but robbery is a non-bailable offence, and regard must be paid to gravity of the crime. Bail is at the discretion of the Court, and cannot be granted solely because an able advocate endeavours to demand it.

Now the next step in this unhappy case is that the accused was re-arrested on 9th February 1949 — nearly four months later. I do not know the cause for this action, it was not explained, nor have I had anything before to suggest that additional evidence, not forthcoming earlier, had come to light.

It was then apparently decided to hold a preliminary inquiry and that took six weeks — until the 21st of March, 1949. There were only seven prosecution witnesses, and three of these were extremely short. Finally the proceedings were not received in this Registry until the 11th of April, 1949, nearly six months after the offence is dated. Such delays reflect no credit on Courts or Police.

Before proceeding to the evidence there is another matter which must be mentioned. An accused person is entitled to a certified copy of the depositions on demand. Mr. Lee Thean Chu for the accused did not himself apply for a copy; the accused made application on the 24th of April, 1949. In my view the committing Magistrate should enquire from the accused person on committal as to whether he requires a copy of the depositions so that he may have early opportunity to prepare his defence.

Now the complainant (2 P.W.) was undoubtedly attacked by some one, and in his evidence he said at first that the accused came with two others and later he spoke of three others; he gave the names of two, Mat and Awang Dali. I understood from the Deputy Public Prosecutor that the two persons named were originally charged with the accused, yet they did not appear in the Court at all. It is very peculiar.

In the witness box the complainant, who is an old man, gave his age as 70, and who on the night in question was alone on the little island of Pulau Bunting, said he was woken by the sound of a shot, followed by a demand to open the door. He therefore rose, lit his lamp Ex. P1 which could only have afforded the barest glimmer, and started to open. The door was double and he first opened one side, then to open the other he moved his lamp from where he had placed it on the floor. Apparently the attacker waited for the whole door to be opened, and then as the old man raised his head, presumably after bending to pick up the lamp, the accused, he said, struck him twice, and yet a third blow as he fled through the back.

It is perhaps natural that the complainant, a fisherman, should seek refuge in the sea, most people would hide on land, but the complainant took to water and said the accused twice fired at him with a shot gun. The rest of the night the complainant said he hid and the next morning discovered his house in disorder with money and belonging missing.

The house is described as the usual type of Malay attap structure raised from the ground with steps up to the door. How useful a rough plan would have been. The complainant in cross-examination said his sight was good by day, but not so good at night, and I am not surprised considering his age. Nevertheless he seemed quite positive as to the identity of the accused. He had known him before, but never spoken to him.

Now within a comparatively few hours the complainant made the statement Ex. P6 and it is unfortunate it was never put to him when he gave this evidence. It was tendered as corroborative evidence of the complainant's evidence in this Court (section 157 of the Evidence Enactment) but it is very materially different. Instead of the tale of a lone shot in the night, demand to open and sudden attack, there is an account of argument and quarrel over the delivery of firewood, something the complainant never mentioned in evidence, and a version totally at variance with the case for the prosecution.

Toward the close of the case for the prosecution it became apparent that the charge of robbery could not be sustained. No stolen property was recovered, indeed, looking through my notes there is little evidence that it was ever seriously looked for. The most that could be preferred was voluntarily causing hurt contrary to section 324 of the Penal Code and in exercise of the powers contained in section 158(i) of the Criminal Procedure Code I altered the charge accordingly. I do not like this procedure; the available evidence should usually be quite known to the prosecution and such alteration of charge should only be necessary if something arises *ex improviso* which normal ingenuity could not foresee.

I have observed before, and must mention again, necessity for proper proof of exhibits from the time of acquirement. The chain must be complete from first possession to the Court. Ex. P4 was obtained by Lance Corporal Bidin bin Arshad (5 P.W.) and was tendered to show that a shot had been fired *into* the complainant's house, although the complainant himself never suggested this. The Police Lance Corporal said when he removed it from the wooden wall of the complainant's house it contained pellets; it does not now; it looks like any old piece of wood from a packing case which had been nailed. The police Lance Corporal said he handed it to Inspector Nik Yusoff (4 P.W.), and the latter Officer said he put it in the Police Store. As the Inspector later proceeded on leave it seems quite possible that some interference occurred. Pellets embedded in wood do not normally drop out, and there are no pellets in Ex. P4 now.

The defence is an *alibi*, and I cannot emphasise strongly the value of early disclosal. In this case so far I can know it was first raised in this Court at the day of trial. But although put up at this last moment it does not absolve the Police from the apparent omission to check the accused's movements on the date in question. (*R. v. Liddle*[1]; *Mallal* 3rd Edn. pp. 256 and 257). Inspector Nik Yusoff bin Mohamed (4 P.W.) said he had made inquiries at the accused's house without result — a complete negative. I wish I could rely on this. I wonder if any real inquiry was in fact made, certainly it would seem that no very thorough inquiry was made or some evidence would have been adduced. It is significant that no defence witness was asked if Police inquiries had been made as to the whereabouts of the accused on the particular date. Such inquiries should be routine. So often in these Courts is the defence "I was not there". Quite possibly this was said on arrest but section 113 of the Criminal Procedure Code may preclude Court knowledge of it; how seldom is evidence forthcoming of movements material to the case, yet the Police may know of the defence from the outset. What easier than to bring evidence that the accused was at "X" and "Y" at times "A" and "B" while at period Z careful inquiries failed to disprove his presence at the scene.

Certainly the defence showed accused had toothache at the time and the inference was that he was too unwell in consequence to make a overnight excursion. He was fond of bird shooting and had a licensed shot gun; the evidence was that he had been out shooting in the evening of October 15th but returned owing to toothache. There were some strong discrepancies on

the defence evidence as to the movements on the 15th of October, but I am satisfied that the accused went shooting and had face ache which persisted till arrest.

Not infrequently there is an excess of caution in identification. Parades are sometimes needlessly held, but in this case when the case for the prosecution rests solely on the evidence of the complainant and he stated there were four attackers of which he only knew three by name, it is surprising that he was not called upon to confirm his report by identification.

In this case there is the evidence of the complainant versus the defence of *alibi*. The injuries suffered by the complainant speak for themselves but were they suffered in the circumstances he testified, or were they the consequence of the quarrel over firewood as stated by the complainant a few hours afterwards in Ex. P6? And can the eyesight of the complainant be relied upon at his age in the middle of the night? The Medical witness (1 P.W.) was not asked and the complainant's sight was never apparently tested.

I think the account in Ex. P6 is more than possible. It is also quite likely that the accused would go bird shooting with friends at Hari Raya, a holiday season. But neither is the prosecution case.

The accused must have the benefit of the doubt.

Before concluding I would like to mention one other point. I consider a Police Inspector should appear in uniform. I am aware that the present Police dress appears very informal and perhaps Inspector Nik Yusoff looked smarter in plain clothes, but Judges robe and Counsel robe and I think the Police might pay the Court the compliment of appearing in the dress worn for ceremonial occasions.

The accused is found not guilty. He is acquitted and discharged.

*Case dismissed.*

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## LEE ENG JOO v. KOK BOON KENG & ORS.

[A. C. J. (Thomson J.) May 9, 1949]
[Ipoh — Civil Appeal No. 3 of 1949]

*Labour Code (Cap. 154), s. 93 — Contract — Master and servant — Custom of trade.*

In this case the only point of substance in dispute between the parties was whether or not an employer in the fish catching business (that is to say in this case the appellant) is entitled to deduct from wages advances made by him to his employees at the commencement of the period of service when the contract of employment is terminated by him and not by them. The Deputy Commissioner for Labour from whose decision this appeal was heard held that there is a custom of the trade whereby when, as in this case, it is the employer and not the employees who terminate the contract of service, the employer is not entitled to deduct advances made by him. He held that the custom was an implied term in the contract of service in the case and decided the dispute before him accordingly.

**Held:** (1) a custom to be good must be reasonable, certain and notorious; (2) in this case the custom alleged was one which no Court of law could accept or uphold except on very much more detailed and very much stronger evidence than was before the Dy. Commissioner for Labour.

*Case referred to:—*

(1) *Devonald v. Rosser & Sons,* (1906) 2 K.B.D. 728 at p. 743.

CIVIL APPEAL.

Respondents in person.

**Thomson J.** : — This is an appeal against an order of the Deputy Commissioner for Labour, Perak, made by him under section 93 of the Labour Code.

A large number of points, some of them of a highly technical nature, were raised by the appellant. I do not, however, propose to deal with these *seriatim* because I have come to the conclusion that there is only one point of substance in dispute between the parties and that is whether or not an employer in the fish catching business (that is to say in this case the appellant) is entitled to deduct from wages advances made by him to his employees at the commencement of the period of service when the contract of employment is terminated by him and not by them. The Deputy Commissioner for Labour held that there is a custom of the trade whereby where, as in this case, it is the employer and not the employees who terminate the contract of service, the employer is not entitled to deduct advances made by him. He held that the custom was an implied term in the contract of service in the case and decided the dispute before him accordingly.

On the evidence as it appears on the record, it is a matter of no small difficulty to ascertain who were the parties to the contract in question and what were its terms.

It is clear, however, that some time in October, 1948, one or more agreements were made to which the present appellant, the respondent Kok Boon Keng and the seventeen other respondents were parties. In effect the Deputy Commissioner decided that there was only one agreement to which the parties were the appellant on the one side and the eighteen respondents on the other side. He took the view that this was a contract of employment, that the appellant was the employer and that the respondents were all labourers employed by him.

On the evidence I am unable to discover any adequate support for this view. The respondent Kok Boon Keng said that the appellant called upon him to provide men but he went on to say that the monies payable under the contract were paid to him and divided by him, apparently in such proportions as he himself saw fit, among the others. The only other respondent who gave evidence agreed that the appellant never had any direct dealings with him. The appellant on the other hand did not admit that he had had contractual relations